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8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,) Criminal Case No. 08CR1184-WQH
11)
12 Plaintiff,) DATE: May 19, 2008
13 v.) TIME: 2:00 p.m.
14 ESTEBAN ARELLANOS-ROJAS,)
15) GOVERNMENT'S RESPONSE AND
16 Defendant.) OPPOSITION TO DEFENDANT'S
17) MOTIONS:
18) (1) TO COMPEL DISCOVERY
19) (2) FOR LEAVE TO FILE FURTHER
20) MOTIONS
21) TOGETHER WITH STATEMENT OF FACTS,
22) MEMORANDUM OF POINTS AND
23) AUTHORITIES AND GOVERNMENT'S
24) MOTIONS FOR RECIPROCAL DISCOVERY
25) AND FINGERPRINT EXEMPLARS

26 The United States of America, by its counsel, Karen P. Hewitt,
27 United States Attorney, and Paul S. Cook, Assistant United States
28 Attorney, hereby responds to and opposes Defendants' above-captioned
Motions. This response and opposition is based upon the files and
records of the case, together with the attached statement of facts and
memorandum of points and authorities. The Government also hereby
files its motion for reciprocal discovery and fingerprint exemplars.

I

STATEMENT OF FACTS

On Saturday, March 15, 2008, Defendant was arrested, for being under the influence of heroin, by an Imperial County Deputy Sheriff at the intersection of Heber Road and Highway 86 in Heber, California. Defendant was booked into the Imperial County Jail and immigration authorities were notified.

An Immigration Enforcement Agent reviewed records and determined that the Defendant was a Mexican citizen with no legal permission to be in the United States and had been ordered removed from the United States by an Immigration Judge on May 15, 2001. This Order of Removal had subsequently been reinstated six times when the Defendant was found in this country. The most recent removal was February 6, 2004. The Defendant has a December 2000 conviction for First-degree Residential Burglary.

On March 19, 2008, Defendant was turned over to ICE agents, and taken to the Imperial, California ICE office. He was advised of his Miranda rights, signed a waiver of his rights, and voluntarily agreed to speak to agents without an attorney present. Defendant stated that he is a Mexican citizen, born in Mexicali, Mexico. He stated that he had no legal status to be in the United States and had last crossed the international border by walking through the mountains. He acknowledged that he was previously removed from the United States and had not applied for permission to re-enter the country. Although he knew it was illegal to re-enter the country, he was going to be with his daughter.

Defendant was also advised of his right to speak to a Mexican Consular official, and declined to exercise that right.

II

THE GOVERNMENT HAS AND WILL CONTINUE TO COMPLY WITH
ITS DISCOVERY OBLIGATIONS

5 The United States is aware of its discovery obligations, and will
6 continue to comply with its obligations under Brady v. Maryland, 373
7 U.S. 83 (1963), the Jencks Act (18 U.S.C. §3500) and Rule 16 of the
8 Federal Rules of Criminal Procedure. and will continue to comply with
9 all discovery rules. The United States has provided Defendants with
10 70 pages of discovery including: the arrest reports, the Defendant's
11 criminal history; a CD of Defendant's interview; and immigration
12 documents relevant to his deportations. Regarding some of the
13 specific requests made by the Defendant which are not covered by the
14 above acknowledgment, the United States responds as follows:

1. Rule 404(b) Evidence

16 The United States hereby provides Defendant with notice of its
17 intent to present evidence pursuant to Rule 404(b). The Government
18 intends to use one or more of the Defendant's six prior apprehensions
19 for Illegal Entry or Deported Alien found in the United States (as
20 mentioned above), and any statements he made regarding his citizenship
21 and right to be in the United States. The Government will provide
22 arrest reports and other court documents relevant to Defendant's prior
23 arrests

2 Evidence Seized and Tangible Objects

25 No items of evidentiary value were seized from the Defendant.
26 The Government will provide copies of or an opportunity to inspect all

1 documents, and tangible things material to the defense, intended for
 2 use in the Government's case in chief.

3 3. Criminal Investigation of Any Government Witnesses

4 The Government is unaware of any criminal involvement by any
 5 prospective government witness, or that any witness is under
 6 investigation. Although the Government will provide conviction
 7 records, if any, which could be used to impeach a witness, the
 8 Government is under no obligation to turn over the criminal records
 9 of all witnesses. United States v. Taylor, 542 F.2d 1023, 1026 (8th
 10 Cir. 1976). When disclosure need only extend to witnesses the
 11 Government intends to call in its case-in-chief. United States v.
 12 Gering, 716 F.2d 615, 621 (9th Cir. 1983); United States v. Angelini,
 13 607 F.2d 1305, 1309 (9th Cir. 1979).

14 The Government will turn over evidence within its possession
 15 which could be used to properly impeach a witness who has been called
 16 to testify. Defendant is not entitled, however, to any and all
 17 evidence that a prospective witness is under investigation by federal,
 18 state or local authorities for misconduct.

19 4. Bias, Motive to Lie and Impeachment Evidence Of Prospective
Witnesses

20 The Government is unaware that any information demonstrating that
 21 a witness is biased against Defendant or has a motive to lie. As
 22 noted above, the Government will comply with its obligations under
 23 Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States,
 24 405 U.S. 150 (1972).

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5. Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth Telling

The Government is unaware of any witness with perception, recollection, communication, or veracity problems.

6. List and Addresses of Witnesses

The Government has provided Defendant with the investigative reports relating to this crime. These reports include the names of the law enforcement personnel, eye witnesses and other people interviewed as part of the follow-up investigation. The Government will provide Defendant with a list of all witnesses which it intends to call in its case-in-chief at the time the Government's trial memorandum is filed, although delivery of such list is not required.

See United States v. Dischner, 960 F.2d 870 (9th Cir. 1992); United States v. Culter, 806 F.2d 933, 936 (9th Cir. 1986); United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987). Defendant, however, is not entitled to the production of addresses or phone numbers of possible Government witnesses. See United States v. Hicks, 103 F.3d 837, 841 (9th Cir. 1996) ("A district court that orders the Government and the defendant to exchange witness lists and summaries of anticipated witness testimony in advance of trial has exceeded its authority under Rule 16 of the Federal Rules of Criminal Procedure and has committed error."); United States v. Thompson, 493 F.2d 305, 309 (9th Cir.1977).

Federal Rule of Criminal Procedure 16 does not require the government (or the defense) to disclose the names and addresses of witnesses pretrial. Indeed, the Advisory Committee Notes reflect that the Committee rejected a proposal that would have required the parties

1 to exchange the names and addresses of their witnesses three days
 2 before trial:

3 The House version of the bill provides that each party, the government and the defendant, may discover the names and addresses of the other party's witnesses 3 days before trial. The Senate version of the bill eliminates these provisions, thereby making the names and addresses of a party's witnesses nondiscoverable. The Senate version also makes a conforming change in Rule 16(d)(1). The Conference adopts the Senate version.

7 A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contact directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

12 United States v. Napue, 834 F.2d 1311, 1317-19 (7th Cir. 1987)
 13 (quoting Rule 16 advisory committee notes) (emphasis added).

14 The Government will not disclose the names of witnesses it will not
 15 call at trial.

7. Expert Witnesses

16 The Government will timely notify Defendant of its expert
 17 witnesses, such as a fingerprint expert, and will comply with Fed. R.
 18 Crim. P. 16(a)(1)(G).

8. Personnel Records, Henthorn and Giglio Evidence

20 The United States will comply with United States v. Henthorn, 931
 21 F.2d 29 (9th Cir. 1991) by requesting that all federal agencies
 22 involved in the criminal investigation and prosecution review the
 23 personnel files of the federal law enforcement inspectors, officers,
 24 and special agents whom the United States intends to call at trial and
 25 disclose information favorable to the defense that meets the
 26 appropriate standard of materiality. See United States v. Booth, 309
 27

1 F.3d 566, 574 (9th Cir. 2002) (citing United States v. Jennings, 960
2 F.2d 1488, 1489 (9th Cir. 1992)). If the materiality of incriminating
3 information in the personnel files is in doubt, the information will
4 be submitted to the Court for an in camera inspection and review.

5 Defendant's request that the specific prosecutor in this case
6 review the personnel files is unwarranted and unnecessary. Henthorn
7 expressly provides that it is the "government," not the prosecutor,
8 which must review the personnel files. Henthorn, 931 F.2d at 30- 31.
9 Accordingly, the United States will utilize its typical practice for
10 review of these files, which involves requesting designated
11 representatives of the relevant agencies to conduct the reviews. The
12 United States opposes the request for an order that the prosecutor
13 personally review the personnel files.

14 Defendant has not cited any Federal authority that requires the
15 United States to produce complaints or internal affairs documents.
16 The Pitchess case is inapplicable in federal court, and the United
17 States will be controlled by the obligations imposed by Henthorn.
18 Moreover, Pitchess v. Superior Court, 11 Cal.3d 531, 539 (1974) has
19 been superceded by statute. See Fagan v. Superior Court, 111 Cal.
20 App.4th 607 (2003). Pitchess involved a criminal case in which a
21 defendant who claimed to have acted in self-defense sought evidence
22 as to the police officers' use of force on previous occasions.
23 Pitchess, 11 Cal. 3d at 534, 535. Pitchess is simply inapplicable to
24 Defendant's case.

25 The United States will comply with its obligations to disclose
26 impeachment evidence, if any, under Giglio v. United States, 405 U.S.
27 150 (1972).

9. A-File and Deportation Tape

2 The United States objects to Defendant's request to inspect the
3 entire Alien Registration File ("A-File") associated with Defendant,
4 since the A-File is not Rule 16 discoverable information. The
5 Government has produced and will continue to produce relevant
6 immigration documents from the Defendant's A-File. However, the A-
7 File also contains information that is not discoverable, such as
8 internal government documents and witness statements. (See Fed. R.
9 Crim. P. 16(a)(2)). The United States will produce documents it
10 intends to use in its case-in-chief. A fishing expedition through the
11 A-file is not warranted. Evidence is material under Brady only if
12 there is a reasonable probability that had it been disclosed to the
13 defense, the result of the proceeding would have been different. See
14 United States v. Antonakeas, 255 F.3d 714, 725 (9th Cir. 2001).
15 Defendant has not specified which documents in the A-File are
16 material, and to which he is entitled.

III

The Government has no objection to this motion.

IV

The discovery provided to Defendants, at their request, includes documents and objects which are discoverable under Rule 16(a)(1)(E). Consequently, the Government is entitled to discover from the defendant any books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items that are in Defendant's possession, custody or control and which

1 Defendant intends to use in the Defendant's case-in-chief. See Rule
2 16(b)(1)(A), Fed. R. Crim. P..

3 Fed. R. Crim. P. 26.2 requires the production of prior statements
4 of all witnesses, except Defendants'. The new rule thus provides for
5 the reciprocal production of Jencks statements. The time frame
6 established by the rule requires the statement to be provided after
7 the witness has testified, as in the Jencks Act. Therefore, the
8 United States hereby requests that Defendants be ordered to supply all
9 prior statements of defense witnesses by a reasonable date before
10 trial to be set by the Court. This order should include any form
11 these statements are memorialized in, including but not limited to,
12 tape recordings, handwritten or typed notes or reports.

V

The United States requests that the Court order that Defendant make himself available for fingerprinting by the United States' fingerprint expert. See United States v. Ortiz-Hernandez, 427 F.3d 567, 576-77 (9th Cir. 2005) (Government may have defendant fingerprinted and use criminal and immigration records in Section 1326 prosecution). Defendant's fingerprints are not testimonial evidence. See Schmerber v. California, 384 U.S. 757 (1966). Using identifying physical characteristics, such as fingerprints, does not violate Defendant's Fifth Amendment right against self-incrimination. United States v. DePalma, 414 F.2d 394, 397 (9th Cir. 1969); see also United States v. St. Onge, 676 F. Supp. 1041, 1043 (D. Mont. 1987).

VI CONCLUSION

For the above stated reasons, the Government respectfully requests that the Defendant's motions be denied, except where unopposed, and the Government's motion for reciprocal discovery and fingerprint exemplars be granted.

Date: May 12, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/Paul S. Cook
PAUL S. COOK
Assistant United States Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 08cr1184-WQH

4 Plaintiff,)

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)

CERTIFICATE OF SERVICE

6 ESTEBAN ARELLANOS-ROJAS, }

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9 IT IS HEREBY CERTIFIED THAT:

I, Paul S. Cook, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

14 I am not a party to the above-entitled action. I have caused
15 service of Government's Response and Opposition to Defendant's Motions
16 on the following party by electronically filing the foregoing with the
17 Clerk of the District Court using its ECF System, which electronically
18 notifies them.

19 || 1. Julie A. Blair

20 I declare under penalty of perjury that the foregoing is
21 true and correct.

22 || Executed on May 12, 2008.

Strauß S.